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Nos. 94-631, 94-797, 94-929

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1994

ZELL MILLER, ET AL.,
*Appellants,*
*v.*
DAVIDA JOHNSON, ET AL.,
*Appellees.*

UNITED STATES OF AMERICA,
*Appellants,*
*v.*
DAVIDA JOHNSON, ET AL.,
*Appellees.*

LUCIOUS ABRAMS, JR., ET AL.,
*Appellants,*
*v.*
DAVIDA JOHNSON, ET AL.,
*Appellees.*

**On Appeal from the United States District Court for the Southern District of Georgia**

## BRIEF OF *AMICI CURIAE* Mexican American Legal Defense and Educational Fund, National Asian Pacific American Legal Consortium, National Association for the Advancement of Colored People, National Organization for Women, National Organization for Women Legal Defense Fund, National Urban League, People For The American Way, Women's Legal Defense Fund, IN SUPPORT OF APPELLANTS

## MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

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## MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

## MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the Mexican American Legal Defense and Educational Fund, the National Asian Pacific American Legal Consortium, the National Association for the Advancement of Colored People, the National Organization for Women, the National Organization for Women Legal Defense Fund, the National Urban League, People For The American Way and Women's Legal Defense Fund, respectfully move the Court for leave to file the attached brief as *amici curiae* in support of the appellants. The appellants have consented to the filing of this brief. Appellees have refused to grant consent.

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a nonprofit, national civil rights organization headquartered in Los Angeles. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States. Because of the importance of the fundamental right to vote, MALDEF has represented Hispanic voters in numerous voting rights cases, including *City of Lockhart v. United States,* 460 U.S. 125 (1983), *Garza v. County of Los Angeles,* 756 F. Supp. 1298 (C.D. Cal.), *aff'd,* 918 F.2d 763 (9th Cir. 1990), *cert. denied,* 498 U.S. 1028 (1991), and *Hastert v. State Bd. of Elections,* 777 F. Supp. 634 (N.D. Ill. 1991) (three-judge court).

The National Asian Pacific American Legal Consortium ("NAPALC") is a nonprofit, nonpartisan organization whose mission is to advance the legal and civil rights of Asian and Pacific Americans through a national collaborative structure that pursues litigation, advocacy, education, and public policy development. The NAPALC is composed of three organizations based in major urban areas with significant Asian and Pacific Islander populations: the Asian American Legal Defense and Education Fund (New York), the Asian Law Caucus, Inc. (San Francisco), and the Asian Pacific American Legal Center of Southern California (Los Angeles). The enforcement of the Voting Rights Act as a means for providing Asian Pacific Americans with meaningful access to the electoral process is one of NAPALC's top priority programs.

The National Association for the Advancement of Colored People ("NAACP") is a private membership organization of 500,000 members nationwide. It is the nation's oldest and largest civil rights organization. The NAACP was active in the effort to win passage of the Voting Rights Act of 1965 and the subsequent amendments enacted thereto. The NAACP has frequently provided representation to minorities in voting rights cases and has participated in litigation before this Court, including *NAACP v. Hampton County Election Comm'n,* 470 U.S. 166 (1985), and *Statewide Reapportionment Advisory Comm. v. Theodore,* 113 S. Ct. 2954 (1993).

The National Organization for Women ("NOW") is the nation's largest feminist organization devoted to the advancement of women's rights, with over 280,000 members and more than 600 chapters in all 50 states and the District of Columbia. NOW has, since its inception, advocated the full and complete political participation of all people, particularly women and racial and ethnic minorities. Specifically, NOW and NOW's political action committee has a project called "Elect Women For a Change," that supports the election of women to public office.

The NOW Legal Defense and Education Fund ("NOW LDEF") is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to secure equal rights and to eliminate sex-based discrimination. NOW LDEF was founded as an independent organization in 1970 by leaders of the National Organization for Women. A major focus of NOW LDEF's work is to promote civil rights for women, including equal electoral participation.

The National Urban League ("League"), founded in 1910, is the premier social service and civil rights organization in America. The League is a nonprofit, nonpartisan community-based organization headquartered in New York City, with 113 affiliates in 34 states and the District of Columbia. The mission of the League is to assist African Americans in the achievement of social and economic equality. The League implements its mission through advocacy, bridge building, program services, and research.

People For The American Way ("People For") is a nonpartisan, education-oriented citizens organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our Nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has been actively involved in efforts to combat discrimination and its effects and to promote meaningful and effective voter participation by all citizens. These efforts have included conducting nationally recognized voter education and registration programs, participating in legislative advocacy on these issues, and serving as counsel or as *amicus curiae* in important cases before this Court and courts across the country.

The Women's Legal Defense Fund ("WLDF"), founded in 1971, is a national advocacy organization working at federal and state levels to promote policies that help women achieve equal opportunity, quality health care, and economic security for themselves and their families. WLDF has long advocated broad application of the constitutional and statutory guarantees of civil rights under the law.

All of these organizations advocate on behalf of voters who are concerned with maintaining complete openness and diversity in the electoral process. The issue of how congressional boundaries are drawn affects them and their constituencies of minorities and women, and voters around the country.

The resolution of the issues in this case will have an impact on the interests of women and minority voters generally as well as on the particular parties before the Court. This amicus brief focuses on the issues before the Court in light of the historical development and expansion of the constitutional right to vote. *Amici* thus offer a broader perspective regarding the potential impact and importance of this case, as well as a more expansive analysis of the public policy issues in question, than that which is likely to be provided by the particular parties to this case. This brief therefore presents arguments that complement rather than duplicate those of the appellants.

*Amici* represent several broad-based constituencies who will be directly affected by the decision herein. *Amici* also

offer arguments and analysis complementary to the briefs filed by Appellants. *Amici* therefore respectfully request that the motion be granted.

Respectfully submitted,

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### INTEREST OF AMICI

*Amici,* Mexican American Legal Defense and Educational Fund, National Asian Pacific American Legal Consortium, National Association for the Advancement of Colored People, National Organization for Women, National Organization for Women Legal Defense Fund, National Urban League, People for the American Way and Women's Legal Defense Fund have extensive experience in advocacy on voting rights issues and/or in voting rights litigation, and share the goal of preventing any retrenchment by the Courts and Con-

gress of statutes and decisional law which have expanded the right to vote and resulted in the creation of a more inclusive democracy.[1]

## SUMMARY OF ARGUMENT

Since *Brown v. Board of Education,* 347 U.S. 483 (1954), the country has made steady progress in eliminating the effects of its unfortunate history of segregation and discrimination against African Americans. As a result of the enactment and enforcement of the Voting Rights Act of 1965[2] and the amendments to the statute, the longstanding exclusion of minority groups from a voice in governance has begun to change. In the last decade, the perception of the United States as a country governed only by whites (or Anglos) has begun to change. This change in the perception and the reality has provided an avenue of hope for Americans of all colors and backgrounds, and has fostered a sense of inclusion and participation that for so long was nonexistent.

The steady progress which this country has made in expanding the franchise is threatened by the litigation resulting from this Court's decision in *Shaw v. Reno,* 113 S. Ct. 2816 (1993). Through its history our nation has demonstrated an interest in expanding the franchise and fostering participation by different parts of society. The decisions of the courts below and other cases signal a retrenchment which should be avoided. *Amici* urge this Court, when ruling on the merits of these appeals, to consider this case in its historical and legal context.

The Supreme Court has recognized that "the political franchise of voting is a 'fundamental political right, because [it is] preservative of *all* rights.' " *Harper v. Virginia Bd. of Elections,* 383 U.S. 663, 667 (1966); *see also Yick Wo v. Hopkins,* 118 U.S. 356, 370 (1896) (recognizing that the right to vote "is preservative of all rights"). Nevertheless, for many years after

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1. Each organization is described fully in the preceding Motion for Leave to File, which is incorporated by reference herein.

2. The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973 et seq. (1994)).

the founding of this nation, the fundamental right to vote was denied to all except white male property owners.

The nation continues to make its gradual advance toward the achievement of a universal right to suffrage for all adult citizens of the United States, without regard to wealth, race, previous condition of servitude, color, gender, national origin, language minority status, or age. As a result, the "fundamental political right" to vote is no longer the province of a small minority of the citizenry. Rather, it is a right enjoyed and cherished by millions of Americans whose lives are affected by the decisions made by their elected representatives.

*Amici* are committed to ensuring that the right to vote and to participate equally in the electoral process receive this Court's most esteemed recognition, fervent protection and reaffirmation. These appeals, which arise from a decision invalidating one of the districts of the post-1990 Census congressional redistricting plan for the state of Georgia (the Eleventh Congressional District, currently represented by Congresswoman Cynthia McKinney), present issues of great concern to *Amici* and their members and constituents, all of whom are concerned with ensuring that constitutional and statutory provisions prohibiting race-, gender-, wealth-, English literacy- and age-based restrictions upon the right to vote are fully enforced.

*Amici* believe that the right to equal participation in the election of members of the United States Congress is among the most cherished rights of citizens of the United States. Justice Hugo Black wrote that the "Constitution's plain objective of making equal representation for equal numbers of people [was] the fundamental goal for the House of Representatives . . . [and] the high standard of justice and common sense which the Founders set for us." *Wesberry v. Sanders,* 376 U.S. 1, 18 (1964).

Constitutional amendments and congressional enactments since the Civil War have expanded the right of suffrage, consistent with this "plain objective" of the United States Constitution. Racial, ethnic and language minorities and women in America continue to suffer discrimination in employment, housing and other circumstances, despite the progress which

has been made. Amendments to the Constitution, coupled with federal legislation, have been instrumental to the efforts to remedy the effects of discrimination against minorities and women.

The vitality of both the constitutional amendments extending the franchise, as well as the body of laws enacted by Congress to enforce these amendments, are at issue in the appeals now before the Court. *Amici* join the Appellants in urging the Court to reverse the decision below, which seriously conflicts with the fundamental message of the numerous decisions of this Court recognizing the importance of the right to vote. These decisions, acknowledging the damaging and persistent effects of the varied means of disenfranchising large segments of the citizenry of the United States, and remedying the impact of decades of exclusion from the political process that is the legacy of many members of the modern electorate, should not be disturbed.

Our society and the federal courts, including the United States Supreme Court, have struggled in this era with the appropriate limits on explicit consideration of race, national origin and sex. It is important to recognize that congressional enactments such as the Voting Rights Act represent a significant and proper balancing of the interests and concerns at stake.

*Amici* urge the Court to maintain that balance and to reject the unwarranted expansion and misreading of *Shaw* that has spawned these appeals, and similar lawsuits,[3] against post-1990 Congressional and state legislative districts. It would be a national tragedy if *Shaw* was interpreted and followed with finality in such a manner that it would adversely and unnecessarily cause a sudden and drastic reduction of African American and other minority citizens' political participation and representation at this critical time in this still-evolving history of our democracy. This country's commitment to democracy, plu-

3. *See, e.g., United States v. Hays,* No. 94-558 (prob. jur. noted and appeal pending); *Louisiana v. Hays,* No. 94-627 (prob. jur. noted and appeal pending).

ralism and diversity, which insures and safeguards the rights of all of our citizens to equal participation in our electoral process, requires no less.

## ARGUMENT

### *INTRODUCTION*

Appellees are a group of black and white registered voters and residents of Georgia's Eleventh Congressional District who have successfully challenged Georgia's 1990 congressional redistricting on constitutional grounds. Appellees alleged in their complaint that the configuration of the Eleventh Congressional District amounted to unconstitutional racial gerrymandering in violation of *Shaw*.

A majority of the district court held that Georgia's Eleventh Congressional District violated the Equal Protection Clause of the Fourteenth Amendment and permanently enjoined further elections in the district. *Amici* urge this Court to review constitutional history, the legislative history of the Voting Rights Act of 1965 (the "Act") and the case law interpreting the Act as it considers the questions presented in these appeals. *Shaw* acknowledges that race-conscious redistricting may violate the rights of white citizens under some circumstances. But *Shaw* does not require the result reached in the court below. *Amici* urge reversal of the decision below. Constitutional history, legislative history of the Act and its amendments, and the case law interpreting the Act reveal an overall benefit to all citizens — both whites and members of minority groups — when expansions of the right to vote are undertaken. The actions of the State of Georgia and the United States Attorney General are legal and constitutional, and the Eleventh Congressional District should be preserved.

Appellees below have failed to prove any harm suffered by them. They have also failed to prove that Georgia's Eleventh Congressional District is so bizarre or irrational on its face that the only conclusion that could be reached by the Court is that it was created solely on the basis of race. *Amici* urge the Court to resist this attempt to expand the reach of *Shaw*. Some gradual progress has been made in opening up

the American political system to minorities and women. Any retraction of this progress will have a deleterious effect on the political process and the political landscape.

The central underpinning of a free and democratic system of government is the right to vote. The struggle to guarantee that every citizen has an equal voice in government has long commanded the attention and the emotions of this Nation. The expansion of the right to vote is a sign of — and ensures the promotion of — the vitality of democracy in the United States. Dr. Martin Luther King, Jr., once said:

> Give us the ballot, and we will no longer have to worry the federal government about our basic rights. . . . Give us the ballot and we will fill our legislative halls with men of good will. . . . Give us the ballot and we will help bring this nation to a new society based on justice and dedication to peace.[4]

In his remarks, Dr. King asserted that the protection, availability and opportunity to use the franchise guarantees the integrity of the political process and strengthens the society served by that process.

Efforts to ensure that the right to vote is one available to all have been accomplished on several different levels. Through constitutional amendments, through legislative enactments and through the courts, our system has continually protected and broadened this fundamental right.

## I. AMENDMENTS TO THE CONSTITUTION HAVE RESULTED IN AN INCREASINGLY DIVERSE AND REPRESENTATIVE ELECTORATE

The nation's interest in promoting participation in the political process is evident in the expanding protections of the right to vote in our Constitution. In its original form, the Constitution recognized this right. Several amendments to it have expanded this right to all persons: first to African Americans,

4. Quoted in Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 Mich. L. Rev. 1077, 1082 n.14 (1991).

next to women, and later to those between the ages of 18 and 21. The Constitution and its amendments demonstrate the vital national interest in promoting the participation and involvement of all segments of our population in the electoral process.

Article I, Section 2 of the Constitution provides that members of the United States House of Representatives shall be chosen "by the People of the several States" and shall "be apportioned among the several States . . . according to their respective Numbers." U.S. Const. art. I, § 2. In his majority opinion in *Wesberry v. Sanders,* 376 U.S. 1, Justice Black reviewed the debate among the delegates of the Constitutional Convention over whether election should be by the people. According to Justice Black, "[o]ne principle was uppermost in the minds of many delegates: that . . . 'equal numbers of people ought to have an equal number of representatives. . . .' " *Id.* at 10-11 (citation omitted).

African Americans were regarded as property for taxation purposes, and as such, were not allowed to share in having this equal voice, this immutable right. The drafters of the Constitution, in fact, agreed that each slave would be counted as three-fifths of a free person. For the first two hundred and fifty years after America was colonized, most African Americans were enslaved and unable to vote. No woman of any color, race or national origin could vote. By the eve of the Civil War, African Americans, whether "free" or not, were denied the suffrage in most States.[5]

Nevertheless, what can only be described as a deep-rooted drive for equality in this country persisted. The Constitution had recognized and embodied the "ancient 'right of the people to participate in their legislative

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5. African Americans were denied the franchise everywhere except New York and the New England states (excluding Connecticut where they were denied the right to vote). Moreover, in New York, African Americans, but not whites, were required to have $250 worth of property to vote. Chandler Davidson, *The Voting Rights Act: A Brief History, in* Controversies in Minority Voting 7 (Bernard Grofman & Chandler Davidson eds., 1992).

council.'" This, in turn, had been recognized as deriving from "the immutable laws of nature, the principles of the English constitution, and the several charters or compacts" in the Declaration and Resolves of the First Continental Congress of October 14, 1774.[6] In several of the amendments that followed, the movement toward universal suffrage, a natural extension of the idea of equality, would be advanced. Gradually the right to vote was extended beyond educated, wealthy, white, male citizens who owned property.

The right of universal suffrage rose to the forefront of the American political agenda during the Civil War, and thereafter. The enactment of various amendments enlarging the reach of the franchise reflected this country's commitment to its original promise of equality under law for all its citizens regardless of race, color or heritage.

The Thirteenth Amendment formally abolished the institution of slavery. U.S. Const. amend. XIII. This amendment began the process of curing the single greatest failure of the Constitution of 1787, assuring all Americans, including African Americans, a semblance of citizenship.

The drafters of the Fourteenth Amendment in Section 2 addressed the issue of the right of suffrage by penalizing States that deny voting rights.[7] In Section 1, although not explicitly mentioning race, all citizens are guaranteed their 'privileges and immunities', in addition to the equal protection and due process of the laws. Minorities were now provided with a sword with which they would battle the historical vestiges of discrimination. The battle, however, was yet to come.[8]

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6. *See* George Anastaplo, *Amendments to the Constitution of the United States: A Commentary,* 23 Loy. U. Chi. L.J. 631, 833 (1992).

7. U.S. Const. amend. XIV, § 2. It is no secret that this part of the Amendment was overlooked as the franchise for African Americans was eroded some years later. Davidson, *supra* note 4, at 9.

8. With respect to right of suffrage, the Fourteenth Amendment did not serve as a source of authority until the early vote dilution cases. *See, e.g.,*

The Fifteenth Amendment was enacted by Congress in 1870, less than a year after ratification of the Fourteenth Amendment and was directed toward the immediate goal of securing and protecting minority voting rights. It provided, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude. The Congress shall have the power to enforce this by appropriate legislation." U.S. Const. amend. XV. Despite the clear language of this provision, contrivances by southern States, along with often violent white southern resistance to African American suffrage, created the need for further congressional action to fully enforce its guarantees.[9]

Congress made repeated attempts to protect the right of suffrage of African Americans, principally in the Military Reconstruction Acts, the various enforcement acts, Ku Klux Klan acts (to execute the dictates of the Fourteenth and Fifteenth Amendments) and the 1875 Civil Rights Act. But white southern intransigence proved to be a powerful force. African American political power, albeit in its nascency, was suffocated by a variety of means, from the insidious voting fraud and use of gerrymandering and at-large elections with white only primaries, to outright statutory suffrage restrictions, replacement of local elections with appointments and, of course, with intimidation and violence.[10]

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*Gray v. Sanders,* 372 U.S. 368 (1963) (Equal Protection Clause requires that, once a geographical unit for which a representative is to be chosen is designated, all who participate in the election must have an equal vote regardless of race or sex); *Baker v. Carr,* 369 U.S. 186 (1962); *Reynolds v. Sims,* 377 U.S. 533 (1964); *see also Gomillion v. Lightfoot,* 364 U.S. 339 (1960) (Whittaker, J., concurring) (noting that the Fourteenth Amendment, in addition to the Fifteenth Amendment, might provide a source of authority in voting rights cases).

9. Ratification of the Fifteenth Amendment did not alter the exclusion of women of color from the United States' electorate. The right to vote was not extended to women until 50 years later, with the ratification of the Nineteenth Amendment.

10. For a detailed analysis of the legal and extralegal means by which

Most African Americans effectively lost the right to vote by the end of the nineteenth century. Voters enfranchised during Reconstruction were purged from the rolls. The nation lapsed back into pre-abolition times. African American children were consigned to a separate and often tangibly inferior education. The separate but equal doctrine served to justify further institutional racism, supported and enforced through governmental action. Nationwide, enforced separation in public accommodations and most aspects of social life was common.[11] All this persisted despite the guarantee of racially impartial suffrage set forth in the Fifteenth Amendment, and the guarantee of equal protection under law provided for in the Fourteenth Amendment.

Just as the door was closing on the struggle for African American suffrage, the drive for women's suffrage was gaining momentum. The Civil War Amendments clearly served as an example and defined the objective

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NOTES *(Continued)*

African American political power was diluted and African Americans were disenfranchised after the Reconstruction era, *see* J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions, in* Controversies in Minority Voting 135 (Bernard Grofman & Chandler Davidson eds., 1992).

11. *See generally Plessy v. Ferguson,* 163 U.S. 537 (1896). African Americans were not the only minority group subjected to such state-enforced segregation. Virginia's anti-miscegenation statute, invalidated by this Court in *Loving v. Virginia,* 388 U.S. 1 (1967) was also applied to sanction a Chinese man and white woman who married in North Carolina and returned to Virginia to live. *See Naim v. Naim,* 87 S.E. 2d 749 (Va.), *vacated,* 350 U.S. 891 (1955). The law made "any white person and colored person . . . [leaving the] State, for the purpose of being married . . . with the intention of returning . . . [and] cohabiting as man and wife" subject to one to five years imprisonment, if convicted. *Loving,* 388 U.S. at 4-5. Asian- and Mexican American children, like African American children, were required to attend segregated schools for a substantial part of this century. *See, e.g., Gong Lum v. Rice,* 275 U.S. 78 (1927) (holding that exclusion of child of Chinese ancestry from white schools was constitutionally permissible); *Westminster Sch. Dist. v. Mendez,* 161 F.2d 774 (9th Cir. 1947) (challenging segregation of Mexican-American children in public school system).

for the movement to amend the Constitution to eliminate gender-based restrictions on the right to vote.[12]

The next series of voting rights related amendments, the Seventeenth and Nineteenth Amendments, were enacted during the Progressive era in the first quarter of this century. The latter had a goal patently similar to that of the Fifteenth Amendment — expanding the franchise, in this case to include women. The former's extension of popular election for Senators was another important milestone in the development of the right to vote. [13]

The Nineteenth Amendment, echoing the simple text of the Fifteenth Amendment, provides, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. Const. amend. XIX, § 1. The Nineteenth Amendment, as in every other amendment of significance to the right to vote, including the Fourteenth, the Fifteenth, the Twenty-Fourth and the Twenty-Sixth, includes a provision granting Congress the power "to enforce this article by appropriate legislation." *See, e.g.*, U.S. Const. amend. XIX, § 2.

With the enactment of the Nineteenth Amendment, the movement toward universal suffrage in the United States made further strides. The inclusion of women, who once were excluded from the political process purely on the basis of sex, was a watershed event in American history. Women's suffrage and the ratification of the Nineteenth Amendment continued the process of actualization of the principle of equality upon which the nation was founded.[14]

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12. Kris W. Kobach, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments,* 103 Yale L.J. 1971, 1980 (1994).

13. The Seventeenth Amendment provides that: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature." U.S. Const. amend. XVII.

14. In some parts of the country, women, like the emancipated African

The movement toward universal suffrage continued with the Twenty-Fourth and Twenty-Sixth Amendments. The Twenty-Fourth Amendment disallowed the use of a poll tax as a means of withholding the right to vote in presidential and congressional elections.[15] The Twenty-

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NOTES *(Continued)*

American males who preceded them in suffrage, found that even an unambiguous constitutional amendment could not ensure full incorporation into political life. In Georgia, for example, ballots cast by newly enfranchised women voters were targeted in disqualification petitions. *See, e.g., Hawthorne v. Turkey Creek Sch. Dist.,* 134 S.E. 103 (Ga. 1926); *Stephens v. Ball Ground Sch. Dist.,* 113 S.E. 85 (Ga. 1922). Within one year after the ratification of the Nineteenth Amendment, the Georgia legislature enacted laws extending the poll tax (which was originally enacted after the ratification of the Fifteenth Amendment) to women registrants. *Hawthorne,* 134 S.E. at 106-07. The poll tax applied somewhat differently to women than to men, however. Women, unlike men, were relieved of the obligation of paying any tax (at the rate of one dollar per year) for years after they became legally eligible to register (i.e., age 21) but declined to do so. Nolen R. Breedlove, a 28 year old white man who was unable to demonstrate that he had paid poll taxes during the seven years in which he was legally eligible to register, was not allowed to register to vote after refusing to pay his "back" poll taxes. *Breedlove v. Suttle,* 302 U.S. 277, 280 (1937). Breedlove challenged the denial of registration on the ground that it violated the Nineteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment. This Court rejected Breedlove's arguments, holding that "women may be exempted [from payment of accrued poll taxes] on the basis of . . . [the] burdens necessarily borne by them for the preservation of the race," and because "[t]he laws of Georgia declare the husband to be the head of the family and the wife subject to him. . . . [Therefore, t]o subject her to the levy would be to add to his burden." *Id.* at 282.

In the year after the ratification of the Nineteenth Amendment, the Georgia legislature also passed a law which provided "that 'females' shall not be liable to discharge any military, jury, police, patrol or road duty.'" *Powers v. State,* 157 S.E. 195 (Ga. 1931). The Georgia Supreme Court held that this law was "not obnoxious to the Nineteenth Amendment," *id.,* and reaffirmed the *Powers* holding more than a decade later in *Cady v. State,* 31 S.E. 2d 38, 42 (Ga.), *cert. denied,* 323 U.S. 676 (1944).

Finally, Georgia was not among the states responsible for the ratification of the Nineteenth Amendment in 1920. In fact, the Georgia Legislature did not ratify the amendment until *February 20, 1970.* U.S. Const., amend. XIX (West U.S.C.A. 1987) at 983.

15. U.S. Const. amend. XXIV, § 1.

Fourth Amendment, "testifies to the now prevalent opinion that financial considerations or economic interests should not bear upon one's eligibility or power to vote."[16]

The Twenty-Sixth Amendment provides, "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." U.S. Const. amend. XXVI. This most recent amendment to the Constitution removed yet another great barrier to participation in the political process. The inclusion of younger people contributed immensely to the further expansion of the franchise.

This history of amendments to the Constitution reveals the devotion to expansion and broadening of the right to vote for all Americans. This history also provides a framework for the following discussion of congressional enactments to enforce these constitutional guarantees, and the decisions of this Court that have reaffirmed them.

## II. THE VOTING RIGHTS ACT AND ITS AMENDMENTS DEMONSTRATE THE COMMITMENT OF CONGRESS TO ENFORCING THE CONSTITUTIONAL GUARANTEE OF EQUAL POLITICAL OPPORTUNITY

In *Reynolds v. Sims*, this Court recognized that "to the extent . . . a citizen's right to vote is debased, he is that much less a citizen." 377 U.S. at 567. One year after *Reynolds* was decided, Congress exercised its power under Section 2 of the Fifteenth Amendment to pass the Voting Rights Act of 1965. An analysis of the legislative history of the Act provides further evidence of the importance of inclusiveness as a fundamental principle of a fair and democratic government.

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16. Anastaplo, *supra* note 6, at 836. *See also* National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified at 42 U.S.C. § 1973gg-1 et seq. (1994)) (enhancing access to voter registration and providing, *inter alia*, for voter registration to be conducted at public assistance agencies).

President Lyndon Johnson's comments upon signing the Act into law reveal the aspirations of those who fought for the Act's passage:

> The vote is the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison men because they are different from other men.[17]

The Act represented a major contribution to the promotion of fairness and participation in the political process by a coordinate branch of government.

In *South Carolina v. Katzenbach,* 383 U.S. 301 (1966), the Court upheld the constitutionality of the Act. Under the Act, literacy tests were suspended in states which had a history of discrimination in voting.[18] The Court upheld this provision of the Act, explaining that the Act employed this remedy in

> response [to] the feeling that States and political subdivisions which had been allowing white illiterates to vote for years could not sincerely complain about 'dilution' of their electorates through the registration of Negro illiterates. Congress knew that continuance of the tests and devices in use at the present time, no matter how fairly administered in the future, would freeze the effect of past discrimination in favor of unqualified white registrants.

*Id.* at 334.

At the conclusion of its opinion in *Katzenbach*, the Court stated that the Act is "a valid means for carrying out the commands of the Fifteenth Amendment. Hopefully, millions of

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17. Steven F. Lawson, Black Ballots: Voting Rights in the South, 1944-1969 at 3-4 (1976) (quoting President Lyndon B. Johnson).

18. While the use of literacy tests as a device for disenfranchising racial and language minorities is well known, in at least one state an attempt was made to invalidate ballots cast by women — but not men — on the ground of illiteracy. *See Prewitt v. Wilson,* 46 S.W.2d 90 (Ky. Ct. App. 1932). The court labelled the disqualification effort "specious" and held that "male voters [we]re not required to meet the same test . . . [so] it is therefore discriminatory against [women]." *Id.* at 92.

non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live." *Id.* at 337.

Since its enactment in 1965, the Act has been amended four times. Each set of amendments reflects the inexorable movement toward a more inclusive broad-based democracy. The first set of amendments, enacted as the Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified as amended at 42 U.S.C. §§ 1973 to 1973bb-1 (1994)), broadened the franchise by expanding the Act's coverage to include many jurisdictions, especially those outside the deep South, that were exempt from the Act as originally enacted. The amendments also expanded the franchise by granting eighteen-year-old citizens the right to vote. *Id.* The desire for full inclusion of all American citizens in the political process was at the core of Congress' decision to amend the Act. Senator Barry Goldwater, one of the sponsors of the 1970 amendments, testified:

> Being members of the same political community, it is my view that all citizens possess the same inherent right to have a voice in the selection of the leaders who will guide their government.

*Amendments to the Voting Rights Act of 1965: Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary,* 91st Cong., 2d Sess. 282 (1970) (statement of Hon. Barry Goldwater). The statement of Attorney General John N. Mitchell also illustrates the spirit underlying the hearings:

> The right of each citizen to participate in the electoral process is fundamental in our system of Government. If that system is to function honestly, there must be no arbitrary or discriminatory denial of the voting franchise. . . . We have come to the conclusion that voting rights is . . . a national concern for every American. . . . Our commitment must be to offer as many of our citizens as possible the opportunity to express their views at the polls on the issues and candidates of the day.

*Id.* at 182-83 (statement of Hon. John N. Mitchell).

*White v. Regester,* 412 U.S. 755 (1973), unanimously held that multimember state House of Representative districts in two Texas counties violated the constitutional rights of African Americans and Mexican Americans, in violation of the Fifteenth Amendment to the Constitution, by "cancel[ling] out or minimiz[ing] the[ir] voting strength," *Id.* at 765. This Court specifically noted the district court's findings that despite the substantial African American population in Dallas, "since Reconstruction . . . there ha[d] been only two Negroes in the Dallas County delegation to the Texas House of Representatives;" that a "white-dominated organization" in Dallas County controlled Democratic Party candidate slating; and that "racial campaign tactics . . . [targeting white voters were used] to defeat candidates who had the overwhelming support of the black community." *Id.* at 766-67.

Similarly, this Court noted in *White* that San Antonio's Hispanic community, "along with other Mexican-Americans in Texas, had long suffered from, and continue[d] to suffer from, the results and effect of invidious discrimination and treatment in the fields of education, employment, economics, health . . . [and] politics." *Id.* at 768. The Court also noted that although Mexican-Americans comprised nearly 30 percent of the total population of the county, "only five Mexican-Americans since 1880 ha[d] served in the Texas legislature from Bexar County." *Id.* at 768-79. These factors, among others, influenced this Court's decision to affirm the district court's holding that "the multimember district, as designed and operated in Bexar County, invidiously excluded Mexican-Americans from effective participation in political liege, specifically in the election of the representative to the Texas House of Representatives." *Id.* at 769. In response to these circumstances, "[s]ingle-member districts were . . . required to remedy the effects of past and present discrimination against Mexican-Americans' . . . and bring the community into the full stream of political life of the county and State." *Id.*

Two years after the *White* decision, "the minority language provisions were added to the Act upon determination by the Congress that 'voting discrimination against [language

minority] citizens ... is pervasive and national in scope.'" Congress found that because of the denial of equal educational opportunities by State and local governments, language minorities experienced severe disabilities and illiteracy in the English language that, together with English-only elections, excluded them from participation in the electoral process.[19]

The legislative history accompanying the language minority provisions added to the Voting Rights Act in 1975 (42 U.S.C. §1973b(f)(1)) documents a pattern of discrimination against language minorities which has interfered with their exercise of the fundamental right to vote. *See, e.g.*, Voting Rights Act Extension, H. Rep. No. 196, 94th Cong., 1st Sess. 1975; Voting Rights Act of 1965 — Extension, S. Rep. No. 295, 94th Cong, 1st Sess. 1975, *reprinted in* 1975 U.S.C.C.A.N. 774. Congress found that "[l]anguage minorities, like blacks throughout the South, must overcome the effects of discrimination as well as efforts to minimize the impact of their political participation." H.R. Rep. No. 196, 94th Cong., 1st Sess. (1975) at 16-17.

Congress recognized that by broadening the prohibition of "discriminatory tests or devices" so as to preclude English-only ballots, non-English-speaking citizens were more likely to realize a meaningful franchise. *Id.* As in 1965 and 1970, broadening the franchise was, again, at the core of the debate:

> In the quest for the right to vote, Spanish-speaking citizens have had many experiences which were similar to those of blacks. It is time for the nation to end discrimination which is based on national origin. Just as the Voting Rights Act has brought about progress among blacks and whites in the South, it can be an instrument of progress for all people in those areas where there are Spanish-speaking communities.

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19. U.S. Commission on Civil Rights, *The Voting Rights Act: Unfulfilled Goals* 77 (1981), *quoting United States Senate, Subcommittee on Constitutional Rights of the Committee on the Judiciary, Extension of the Voting Rights Act of 1965: Hearings on S.407, S.903, S.1509, and S.1443*, 94th Cong., 1st Sess. (1975).

*Hearings on the Voting Rights Act Amendments Before the Subcommittee on Civil and Constitutional Rights of the Senate Judiciary Committee,* 94th Cong., 1st Sess. 64 (1975) (testimony of Hon. Andrew Young).

Some of the barriers to political participation that language minorities have faced are identical to those used to impede African American voter participation and dilute African American voting strength. They include imposition of the poll tax, erection of barriers to voter registration by hostile election officials, and the manipulation of election district boundaries to dilute political support for their preferred candidates and ensure control of elections by white voting blocs. H. Rep. No. 196, 94th Cong., 1st Sess. (1975), at 16-20; S. Rep. No. 295, 94th Cong., 1st Sess. (1975), at 26; *see also* H. Rep. No. 94-196 at 22 (noting federal court finding that state of Texas has "a history pockmarked by a pattern of racial discrimination that has stunted the electoral and economic participation of the black and brown communities in the life of the state"). More recently, the United States Court of Appeals for the Fifth Circuit, in *League of United Latin American Citizens v. Midland Independent Sch. Dist.,* 812 F.2d 1494 (5th Cir.), *vacated on other grounds en banc,* 829 F.2d 546 (5th Cir. 1987), recognized that African American and Hispanic Texans "share[d] common experiences in past discriminatory practices." *Id.* at 1500.

At the beginning of this decade, a federal court found that Los Angeles, California's Hispanic community "has borne the effects of a history of discrimination in the areas of education, housing, employment, and other socioeconomic areas." *Garza v. County of Los Angeles,* 756 F. Supp. 1298, 1339-40 (C.D. Cal.), *aff'd,* 918 F.2d 763 (9th Cir. 1990), *cert. denied,* 498 U.S. 1028 (1991). For a decade "in the aftermath of the Depression, some 200,000 to 300,000 Mexican-Americans returned to their 'country of origin a part of a program instituted by the Justice Department. . . . [M]any legal resident aliens and American citizens of Mexican descent were [thereby] forced or coerced out of the county.' " *Id.* The court noted that Mexican-Americans in Los Angeles were blatantly

discriminated against in public accommodations and education throughout the first half of this century:

> School officials required Mexican children to have separate graduation ceremonies from Anglos attending the same school. . . . California maintained segregated schools for Hispanics in Los Angeles until 1947 when the California Supreme Court struck down such segregation. . . . However, . . . schools desegregation litigation involving [Los Angeles County school] districts . . . continued until 1989. . . . [I]t was common during the first decade of this century, for access to public swimming pools to be restricted for Mexican-Americans and blacks, usually to the day before the pool was to be cleaned.

*Id.* at 1340. It was not until 1970 that the California Supreme Court invalidated a California constitutional provision "conditioning the right of persons otherwise qualified to vote upon the ability to read the English language." *Id.* (citing *Castro v. State of California,* 466 P.2d 244 (Cal. 1970)).

The *Garza* court also found that Esteban Torres a Hispanic candidate for the United States House of Representatives, "encountered racial appeals by his opponents in the form of statements that Mr. Torres catered only to Hispanics and in the use of his photograph in opponents' campaign literature." *Id.* at 1331, 1341. In Torres' race, like all but a handful of the elections analyzed by plaintiffs' experts, non-Hispanic voters overwhelmingly rejected the Hispanic candidate. *Id.* at 1336-37.

Since the extension of the Act in 1975 to cover language minorities, the number of Hispanic elected officials has increased dramatically. In 1973, the six states with the largest Hispanic populations had 1,280 Hispanic elected officials. Twenty years later this number had jumped to 3,999.[20]

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20. 1993 National Roster of Hispanic Elected Officials at vii (1993) (Table 18: Hispanic Elected Officials by Selected States, 1984-1993). Pre-1980 data is available only for the following six states: Arizona, California, Florida, New Mexico, New York, and Texas. Nationwide data is available starting in 1984. In that year the total number of Hispanic elected officials was 3,128; in 1993 it was 4,420. This number excludes 750 local school coun-

Unquestionably, the creation of districts which afford Hispanic voters a realistic opportunity to elect candidates of their choice has contributed to these gains. Since the extension of the Act, the Hispanic population has also achieved substantial gains in its participation in the political process. The number of Hispanic registered voters nearly doubled from 1972 to 1988, increasing from 2.495 million to 4.573 million.[21] This increased registration manifested itself in higher Hispanic voter turnout, as well.[22] Despite these gains, although Hispanics constitute nine percent of the total population of the United States, they account for only slightly more than one percent of the publicly-elected officials in the nation.[23] The work started by the passage of the Act is not yet complete. The result herein must not create an environment in which the progress which has been made will be reversed.

The experience of Asian Americans in many respects parallels the experience of Mexican Americans described by the *Garza* court. "[U]ntil 1947, a California statute authorized local school districts to maintain separate schools for children of Asian descent." S. Rep. No. 295, 94th Cong., 1st Sess. (1975) at 28 (citing *Guey Heung Lee v. Johnson,* 404 U.S. 1215

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cil members in the Chicago area, positions which were not included in the 1984 count.

21. The Southwest Voter Registration Education Project, Legacy: 1974-1990, at 2. During this period the number of Hispanic registered voters increased by 83 percent. This number's true significance becomes apparent only after comparable rates are considered for other segments of the population. From 1972 to 1988 the number of white registered voters increased by 17 percent and that of African Americans by only 44 percent. *Id.*

22. For five southwestern states (Arizona, California, Colorado, New Mexico and Texas), votes cast by Hispanics increased 60.9 percent, from 1.016 million in 1976 to 1.634 million in 1988. Legacy, *supra* note 21, at 2. Comparison data is available for the period 1984 to 1988. During this time Hispanic turnout increased 20 percent; for the nation as a whole, it increased 0.3 percent. *Id.*

23. 5,170 Hispanics (including the Chicago school officials) held publicly-elected offices in 1993, as compared to 504,404 publicly-elected offices nationwide (1.0 percent). 1993 National Roster of Hispanic Elected Officials at viii.

(1971)). Hostility toward Asian immigrants led to strict regulation of entry to the United States and bans on naturalization. Persons of Japanese ancestry were once completely denied the opportunity to become naturalized citizens. *Takao Ozawa v. United States,* 260 U.S. 173 (1922). "Filipinos, who were subjects of the United States . . . [were nevertheless] ineligible for citizenship unless they served three years in the U.S. Navy. . . . [and] Chinese immigrants were not allowed to gain citizenship until 1943."[24] Japanese Americans were removed from their homes and confined to internment camps during World War II. *See Hirabayashi v. United States,* 320 U.S. 81 (1943); *Korematsu v. United States,* 323 U.S. 214 (1944).[25] Regrettably, as Congress noted in the legislative history accompanying the 1975 amendments to the Act, "[d]iscrimination against Asian Americans is a well-known and sordid part of our history." S. Rep. No. 94-295 at 28 n.21.

Limited English proficiency has remained a serious barrier to effective political participation for many Asian-Americans in the United States. *See The Voting Rights Act Language Assistance Amendments of 1992,* S. Rep. No. 315, at 5-6, 102d Cong., 2d Sess. (1992). Although Asian-Americans comprise almost 10% of California's population, only one Asian American, elected in 1992, is serving in the California state legislature. And in New York City, which has an Asian-American population of over 512,000, no Asian-American has ever been elected to the New York City Council or the New York state legislature. *See* U.S. Civil Rights Comm'n, Civil Rights Issues Facing Asian Americans in the 1990s 157 (1992).

The most recent amendments to the Act were passed with broad bipartisan support in August 1992, affecting over 200,000 Asian Americans with limited English proficiency across the nation. The Voting Rights Language Assistance Act of 1992 expanded the minority language requirements of Section 203 of the Act, 42 U.S.C. §1973aa-1a, to require multilin-

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24. Karen McGill Arrington, *The Struggle to Gain the Right to Vote: 1787-1965,* in Voting Rights in America: Continuing the Quest for Full Participation (Karen McGill Arrington and William L. Taylor, eds., 1992) at 34.

25. *See also* Eugene Rostow, *The Japanese-American Cases — A Disaster, 54 Yale L.J. 489 (1945).*

gual voting materials and assistance in jurisdictions with at least 10,000 voting age citizens of a single language minority group. Voting Rights Act Amendments of 1992, § 2, Pub. L. No. 102-344, 106 Stat. 921 (codified as amended at 42 U.S.C. § 1973aa-1a (1994)). These amendments enable the Asian American community to participate more effectively in the political process.

The 1982 amendments to the Act, promulgated shortly after (and in response to) this Court's decision in *City of Mobile v. Bolden,* 446 U.S. 55 (1980), reflect Congress' continued determination to refine the Act so as to expand and amplify the right to vote and, thereby, prevent vote dilution. In 1982, Congress rejected an intent-based standard in favor of a test that focused on the "effect" of a challenged practice. Voting Rights Act Amendments of 1982, S. Rep. No. 417, 97th Cong., 2d Sess., *reprinted in,* 1982 U.S.C.C.A.N. 177, 191. Thus, these amendments fostered access to the political process by, *inter alia,* prohibiting voting practices that "result[] in a denial or abridgment of the right . . . to vote." Voting Rights Act Amendments of 1982, § 3, Pub. L. No. 97-205, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973(a)). These amendments were enacted to redress the more subtle forms of discrimination that had emerged during the seventeen year period since the Act was first passed.

The Senate Report accompanying the 1982 amendments reveals that, no less than in 1965, expanding the franchise remains inextricably intertwined with Congress' intent to ensure electoral equality in an inclusive democracy:

> The Committee bill will extend the essential protection of the historic Voting Rights Act. It will insure that the hard-won progress of the past is preserved and that the effort to achieve full participation for all Americans in our democracy will continue in the future.
>
> Seventeen years ago, Americans of all races and creeds joined to persuade the Nation to confront its conscience and fulfill the guarantee of the Constitution. . . .
>
> As a result of the Voting Rights Act of 1965, hundreds of

> thousands of Americans can now vote and, equally important, *have their vote count as fully* as do the votes of their fellow citizens.

*See* S. Rep. No. 417, 97th Cong., 2d Sess. (1982), at 214.

On June 29, 1982, President Reagan signed the Voting Rights Act Amendments of 1982 into law, announcing: "As I've said before, the right to vote is the crown jewel of American liberties, and we will not see its luster diminished."[26]

In the almost thirty years since the enactment of the Act, the Court has generally endorsed its application and extension. In 1969, the Court held that minority citizens could assert a claim for "vote dilution" under the Act. *Allen v. State Board of Elections,* 393 U.S. 544, 569 (1969) (at-large or multimember elections could nullify minority voters' "ability to elect the candidate of their choice just as would prohibiting some of them from voting.").[27] It therefore gave a broad reading to the preclearance provisions of Section 5 of the Act.[28]

In 1986, the Court upheld the constitutionality of the 1982 amendments to the Act and eased the evidentiary requirements for asserting a claim of minority vote dilution by eliminating the requirement of proof of discriminatory intent. *Thornburg v. Gingles,* 478 U.S. 30 (1986).

In subsequent decisions, the Court approved expanding the application of Section 5's preclearance requirement and invigorated the remedy available to enforce Section 5. The Court held that Section 5 covered municipal annexation deci-

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26. White House Press Release (June 29, 1982).

27. *Cf. Fortson v. Dorsey,* 379 U.S. 433, 439 (1965) (multimember districting plan that "designedly or otherwise, ... operate[d] to minimize or cancel out the voting strength of racial or political elements of the voting population" would violate the Equal Protection Clause); *Mobile,* 446 U.S. at 126 ("The Court has long understood that the right to vote encompasses protection against vote dilution. '[T]he right to have one's vote counted' is of the same importance as 'the right to put a ballot in a box.' ") (Marshall, J. dissenting).

28. *See also NAACP v. Hampton County Election Comm'n,* 470 U.S. 166, 175-76 (1985); *Georgia v. United States,* 411 U.S. 526 (1973) (holding that Section 5 must be liberally construed to effectuate its remedial purpose).

sions motivated by an improper purpose. *Pleasant Grove v. United States,* 479 U.S. 462 (1987). It then held that a district court has the authority to enjoin elections if the challenged voting statutes have not been precleared under Section 5. *Clark v. Roemer,* 500 U.S. 646 (1991).

The Court recently extended the reach of Section 2 to elected state judiciaries, stating that the Act "should be interpreted in a manner that provides 'the broadest possible scope' in combatting racial discrimination." *Chisom v. Roemer,* 501 U.S. 380, 403 (1991) (quoting *Allen,* 393 U.S. at 567); *see also Houston Lawyers' Ass'n v. Attorney General,* 501 U.S. 419 (1991).

Finally, last term in *Johnson v. DeGrandy,* 114 S. Ct. 2647 (1994), the Court reaffirmed the *Gingles* framework for analyzing Section 2 claims and noted that "society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity." *Id.* at 2661.

Amendments to the Act have resulted in a dramatic increase in the numbers of African American and Hispanic officials across the country. These minority groups have also greatly increased their participation in the political process. The Act, as amended, has contributed greatly to making the constitutional guarantees of the right to vote meaningful for the nation's racial, ethnic, and language minority citizens. The decision below jeopardizes the benefits to minority citizens, and indeed to the entire body politic, that have resulted from the vigorous enforcement of the Act. *Amici* therefore urge the Court to reverse the decision below.

## III. THE HISTORY OF VOTING RIGHTS LITIGATION IN THE SUPREME COURT SHOWS THE COURT'S COMMITMENT TO EXPANDING THE RIGHT TO VOTE

The history of Supreme Court case law of voting rights can be divided into three phases. In the first phase, from early in the twentieth century until 1960, the Court invalidated discriminatory measures designed to prevent minorities from vot-

ing. During the second phase, which began in 1960 and lasted until 1966, the Court promoted the idea of one-person, one-vote. This phase coincided with the Court's continued efforts to remove obstacles intended to prevent minorities from voting. In the third phase, which began in 1966 (as discussed in Section II), the Court upheld the constitutionality of the Act, and expanded the application of the Act to promote the efficacy and fairness of the political process.

As early as 1915, the Court invalidated an Oklahoma statute that included a grandfather clause excusing whites from taking the state's literacy test. *Guinn v. United States,* 238 U.S. 347 (1915). Although the statute did not mention race, it included an exception for persons able to vote on January 1, 1866 — before the adoption of the Fourteenth and Fifteenth Amendments. The Court nullified the statute even though it imposed the literacy test in a superficially neutral manner. *Id.* at 364-65.

The white primary represented another discriminatory measure employed by the white majority in the South to exclude minorities from the political process. The Court considered numerous challenges to the white primary in Texas before finally declaring the practice unconstitutional in *Smith v. Allwright,* 321 U.S. 649 (1944).

In *Smith,* the Court held that Texas statutes excluding African-Americans from voting in a Democratic primary to select nominees for a general election violated the Fifteenth Amendment. The Court explained, "it may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution. By the terms of the Fifteenth Amendment that right may not be abridged by any State on account of race." *Id.* at 661-62 (citations omitted).

Texas argued that participation in the primaries was determined by private organizations rather than the State, and that the Constitution did not reach the conduct of those organizations. The *Smith* decision demonstrates the Court's com-

mitment to preserving the integrity of the democratic process by assuring equal electoral opportunity for all:

> The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.

*Id.* at 664.

Fort Bend County in Texas was undeterred by this admonition. In that county, an association that dominated the Democratic Party employed a white "pre-primary." The Court invalidated this practice in *Terry v. Adams,* 345 U.S. 461 (1953), explaining that "the effect of the whole procedure . . . is to do precisely that which the Fifteenth Amendment forbids — strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens." *Id.* at 469-70.

In *Gomillion v. Lightfoot,* 364 U.S. 339 (1960), the Court held that an Act of the Alabama Legislature changing the boundaries of the City of Tuskegee was unconstitutional because the Act eliminated nearly all of its African American voters from the City without eliminating any white voters. Shortly after *Gomillion,* the Court confronted the question of whether to review political measures that did not exclude minorities from the political process but instead diluted the value of their votes.

The seminal case, *Baker v. Carr,* 369 U.S. 186 (1962), held that the question of whether reapportionment in Tennessee — which legislators refused to do in a manner corresponding to actual population concentrations — presented a justiciable case. *Id.* at 209.

Georgia's county unit system as a basis for counting votes was the subject of a constitutional challenge in *Gray v. Sanders,* 372 U.S. 368. Under the county unit system, the vote of

each citizen in Georgia counted for less as the population of the county increased. "Georgia gives every qualified voter one vote in a statewide election; but in counting those votes she employs the county unit system which in end result weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties." *Id.* at 379.

Because the county unit system diluted the vote of some state residents, the Court upheld the district court decision enjoining the use of the county unit system. The Court explained:

> The Fifteenth Amendment prohibits a State from denying or abridging a Negro's right to vote. The Nineteenth Amendment does the same for women. If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro; none could successfully contend that discrimination was allowable. . . . Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote — whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. . . . The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing — one person, one vote.

*Id.* at 379-81 (citations omitted).

Subsequently, another Georgia electoral practice was the subject of *Wesberry v. Sanders,* 376 U.S. 1, in which the Court held that the State's failure to align its congressional districts in a way that reflected the population violated the Constitution. Under the 1931 Georgia Apportionment Statute, one Congressman represented "two times as many Fifth District voters as are represented by each of the Congressmen from the other Georgia congressional districts." *Id.* at 7.

*Wesberry* may be viewed as a companion case to *Reynolds v. Sims,* 377 U.S. 533, in which the Court articulated the one-person, one-vote standard that is the foundation of voting rights jurisprudence. In *Reynolds,* the Court held that the Equal Protection Clause requires substantially equal legislative representation for all citizens in a state regardless of their residence. Discussing the right to vote, the Court stated:

> Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear.... [H]istory has seen a continuing expansion of the scope of the right of suffrage in this country. The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as wholly prohibiting the free exercise of the franchise.

*Id.* 554-55 (citations omitted).

At the same time this Court established the one-person, one-vote principle, it continued to review the political process to remove barriers impeding participation in the process. In *Harper v. Virginia Board of Elections,* 383 U.S. 663, the Court held that a poll tax is unconstitutional because it conditions the right to vote on the payment of a fee and therefore violates the Equal Protection Clause of the Fourteenth Amendment. The Court concluded that "wealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Id.* at 670.

The Supreme Court upheld Congress' decision to enfranchise 18-year old citizens in national elections. *Oregon v. Mitchell,* 400 U.S. 112 (1970). In the same case, the Court

upheld Congress's prohibition of using literacy tests to discriminate against voters on account of their race in both state and federal elections.[29]

These cases represent a vision of inclusiveness and an expansion of the right to the franchise to young people, women, language minorities and other people of color, that has been nurtured and made explicit by this Court. The broad and expansive view of *Shaw v. Reno* urged by Appellees herein will have the effect of retrenching and retracting rights which are firmly established in the case law of this Court. For these reasons, the decision below should be reversed.

## CONCLUSION

This Court has been instrumental in giving life to a vision of an America that is diverse and inclusive. In a representative democracy, legislative bodies must be elected with input from all segments of the citizenry to be — in fact and perception — genuinely representative. The decisions of this Court and the Laws enacted by Congress (such as the Voting Rights Act), which implement the constitutional guarantees of the right to equal political participation, have consistently reinforced this principle.

The Voting Rights Act of 1965, as amended, ensures that racial and language minority voters are afforded the same opportunity as white citizens to participate in the political process and elect candidates of their choice. The terrible legacy of governmentally-enforced exclusion of these groups from full political participation has necessitated reliance on measures, including majority-minority electoral districts, which mitigate the deleterious, continuing effects of such exclusion and counteract the persistent phenomenon of racially polarized voting.

As a result of such measures, racial and language minorities in many parts of the country, including Georgia, now

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29. Discussing the right to vote, Justice Douglas stated: "the right to vote is a civil right deeply embedded in the Constitution. . . . Voting concerns 'political' matters; but the right is not 'political' in the constitutional sense. Interference with it has given rise to a long and consistent line of decisions by the court; and the claim has always been upheld as justiciable." *Mitchell*, 400 U.S. at 138-39 (citation omitted).

enjoy unprecedented opportunities to participate fully in the electoral process and have an equal opportunity to elect candidates of their choice to office. Thus, elected bodies, including the United States Congress, have begun to reflect the diversity of backgrounds, perspectives, interests and values of the nation as a whole, rather than a select subset of the population. This promotes the legitimacy of our political process and ensures that the interests of *all* citizens are considered and protected.

The modest gains which have been made in the American political landscape by minorities and women are fragile and should not be dismantled. At this critical point in American history, thirty years after initial passage of the Voting Rights Act and seventy-five years after the enfranchisement of women, *Amici* urge this Court to continue its legacy of vigorously protecting the voting rights of all citizens and fully enforcing the constitutional and statutory provisions that have outlawed discriminatory barriers to full political participation by racial, ethnic and language minority citizens and women in the political process. The decision below should be reversed.

Respectfully submitted,

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